Petition

81-1712

Office - Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JUNE MARTINO, PENELOPE A. RICCIO, EMIL D. CIBIC, VICTOR P. SPILOTRO, WILLIAM LOUIS TENUTA, and LOUIS (Louie the Barber) TENUTA
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALLAN A. ACKERMAN
100 N. LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863

SANTO J. VOLPE
105 W. Madison Street
9th Floor
Chicago, Illinois 60602
(312) 641-5411

Attorneys for Petitioners

CHAS. P. YOUNG CHICAGO, INC.

QUESTIONS PRESENTED

I.

(1) WHETHER THE DENIAL OF ANY SEPARATE OR MULTIPLE CONSPIRACY INSTRUCTION(S) DENIED PETITIONERS [IN THIS CASE] FIFTH AMENDMENT DUE PROCESS OF LAW OR SIXTH AMENDMENT IMPARTIAL JURY RIGHTS?

(2) WHETHER THE CONFUSION SURROUNDING THE GIVING *VEL NON* OF SEPARATE OR MULTIPLE CONSPIRACY INSTRUCTIONS IS SUFFICIENTLY SIGNIFICANT SO THAT CERTIORARI SHOULD BE GRANTED TO REVIEW THE CONFUSION IN THE CIRCUITS AS TO WHETHER SEPARATE CONSPIRACIES ARE A QUESTION OF FACT FOR THE JURY..OR A QUESTION OF LAW FOR THE TRIAL COURT?

II

(1) WHETHER VIOLATIONS OF 26 U.S.C. § 7203 CAN BE SUSTAINED WHERE THE TRIAL COURT DECLINED TO CHARGE THE JURY AS REGARDING ANY EXCEPTIONS TO LIABILITY UNDER 26 U.S.C. §§ 4411, 4412 (CONTRARY TO *INGRAM* v. *U.S.*, 360 U.S. 672 (1959)).

(2) WHETHER A VIOLATIONS OF 26 U.S.C. §7203 CAN BE SUSTAINED WHERE THE TRIAL EVIDENCE SHOWS THAT EACH PETITIONER WAS EMPLOYED BY A REGISTERED ILLINOIS CORPORATION AND THAT THE RACETRACK MESSENGER SERVICE WAS NOT ILLEGAL UNDER THEN-EXISTING STATE LAW?

(3) WHETHER A PERSON MAY STAND CONVICTED OF VIOLATING 26 U.S.C. § 7203 WHERE THE GOVERNMENT FAILS TO SHOW EITHER KNOWLEDGE OR ANY PROPRIETARY INTEREST AS REGARDING THE NEED FOR REGISTERING OR PAYING ANY SPECIAL EXCISE TAX UNDER 26 U.S.C. § 4401, ET SEQ.?

TABLE OF CONTENTS

	PAGE
Opinion below	1
Jurisdiction	1, 2
Statutory and other provisions involved	2
Statement	2-10
Reasons for granting the petition	10-22
Conclusion	23
Appendix 1-1-3 (decision below)	1-1, 1-3
Appendix 2 (order denying rehearing)	2
Appendix 3-1, 3-5 (statutes reproduced)	3-1, 3-5
Appendix 4-1.4-7 (indictment below)	4-1.4-7
Appendix 5-1.5-3 (Jury charge, in part)	5-1, 5-3

TABLE OF AUTHORITIES

Bollenbach v. *U.S.*, 326 U.S. 607, 66 S.Ct. 402 (1946)	22
Blumenthal v. *U.S.*, 332 U.S. 539 (1947)	14, 16
Finish Line Express, Inc. v. *City of Chicago, et al*, 72 Ill.2d 131, 379 N.E.2d 290 (July 14, 1978)	2
Grosso v. *U.S.*, 390 U.S. 62, 88 S.Ct. 709 (1968)	17
Harrison v. *U.S.*, 7 F.2d 259 (CA 2, 1925)	13
Ingram v. *U.S.*, 360 U.S. 672, 79 S.Ct. 1314 (1959)	17, 19, 20
Kotteakos v. *U.S.*, 328 U.S. 750 (1946)	13
Marchetti v. *U.S.*, 390 U.S. 39, 88 S.Ct. 697 (1968)	17
Sanabria v. *U.S.*, 437 U.S. 54, 98 S.Ct. 2170 (1978)	18
United Brotherhood of Carpenters et al, v. *U.S.*, 330 U.S. 395 (1947)	17
U.S. v. *Armedo-Sarmiento*, 545 F.2d 785 (CA 2, 1976)	
U.S. v. *Brown*, 495 F.2d 593 (CA 1, 1974)	12
U.S. v. *Calamaro*, 354 U.S. 351, 77 S.Ct. 1138 (1957)	19, 20
U.S. v. *Cambindo Valencia*, 609 F.2d 603 (CA 2, 1979)	10
U.S. v. *Coward*, 630 F.2d 229 (CA 4, 1980)	12
U.S. v. *Eubanks*, 591 F.2d 513 (CA 9, 1973)	12
U.S. v. *Johnson*, 515 F.2d 730 (CA 7, 1975)	14-16
U.S. v. *Levine*, 546 F.2d 658 (CA 5, 1977)	12
U.S. v. *Nettles*, 570 F.2d 547 (CA 5, 1978)	12
U.S. v. *Spock*, 416 F.2d 165 (CA 1, 1969)	16, 17
U.S. v. *Varelli*, 407 F.2d 735 (CA 7, 1969)	12

CONSTITUTION AND STATUTES

U.S. Const., 5th and 6th Amendments	2, 10, 16
18 U.S.C. § 371, 1955	2, 13
26 U.S.C. § 4401-4412, 7203	2, 17, 18, 20, 21
28 U.S.C. § 1254(i)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JUNE MARTINO, PENELOPE A. RICCIO, EMIL D. CIBIC, VICTOR P. SPILOTRO, WILLIAM LOUIS TENUTA and LOUIS (Louie the Barber) TENUTA,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

June Martino, Penelope A. Riccio, Emil D. Cibic, Victor P. Spilotro, William Louis Tenuta and Louis (Louie the Barber) Tenuta (hereafter Petitioners) petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (app. 1-1 to 3, *infra*) is unreported. The court of appeals as per Circuit Rule 35 affirmed the convictions below by an unreported decision.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1982. A petition for rehearing with suggestions for rehearing *en banc* was denied on February 16, 1982 (App. 2).

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, "nor be deprived of life, liberty, or property, without due process of law;" nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The following statutes are reproduced in our Appendix:

18 U.S.C. § 371
18 U.S.C. § 1955
26 U.S.C. § 4401 *et seq.*
26 U.S.C. § 7203

STATEMENT

Prior to July, 1978, bet messenger services were not illegal. On July 14, 1978 the Illinois Supreme Court ruled horse racing bet messenger services were illegal.[1] The several

[1] *Finish Line Express Inc.* v. *City of Chicago, et al*, 72 Ill. 2d 131, 379 N.E. 2d 290 (July 14, 1978).

petitioners were employees of Chicago area bet messenger services prior to July, 1978.[2] Following the Illinois Supreme Court decision all the Chicago area bet messenger services closed. From July to December 1978, none of the petitioners engaged in any conduct which the government considered illegal. In December, 1978 certain of the petitioners commenced to operate an enterprise known as Western Social Club, Inc. an Illinois Corporation. The manner in which each of these businesses operated . . . was decidedly different.[3] In early 1979 the Social Club moved to a new location in Chicago. Thus, there were two separate entities under at

[2] Western West Track Agents, Inc. an Illinois Corporation; Western Messenger Service, Inc., an Illinois Corporation.

[3] (Tr. 1545-1548). The WESTERN messenger service was actually a series of service stores in several different areas of Chicago. The "satellite stores" would, several times during the day and early evening, transmit their customer orders (wagers) to the main WESTERN store, 5858 W. Fullerton, Chicago, Illinois. The WESTERN MESSENGER CORPORATION employed several track runners or messengers who would periodically communicate with the 5858 location. These "runners or mesengers" would actually place wagers at the several Chicago area racetracks (Tr. 115-116, 122-123, 212, 1281-1284, 1889-1902). Every local messenger service charged the customer 10% of the gross wager as a service charge for transmitting the wager to the racetrack and returning either the proceeds of a winning bet or the losing ticket, if the customer so requested. The "Social Club" which opened in December, 1978 charged a $20.00 membership fee and nothing was charged for taking bets to the track or returning either monies or losing tickets. A trial witness presented evidence to the jury as to his winning $8,800.00 on a trifecta wager through the Social Club (Tr. 1851-1881).

Thus, the MESSENGER SERVICE charged a 10% fee on the gross amount of the wager (e.g., the messenger service charged $11.00 for a $10.00 wager). The Social Club only charged a membership fee, nothing more. In addition, it is clear, that there was at least a six month hiatus as between the closing of the MESSENGER SERVICE and the opening of the SOCIAL CLUB. Each enterprise was an Illinois Corporation.

least two separate Illinois Corporations, at different times, and at different locations.[4]

During the jury trial the government's evidence showed that certain government undercover agents place wagers during the late Spring and early Summer of 1978 at various WESTERN MESSENGER SERVICE, INC. locations. The government then attempted to trace the wagers through the racetrack computers to ascertain whether or not the various wagers actually ended up at the different Chicago-area racetracks.[5] It was not disputed that the MESSENGER SERVICE ENTERPRISE had several satellite stores and that the 5858 W. Fullerton location was a clearing house.[6]

The government also presented evidence which showed some few instances where the messenger service took "late wagers" and did not charge the usual 10% messenger service fee.[7] The agents made certain small wagers at the SOCIAL

---

[4]The government offered evidence, absent dispute, as to the separate corporate entities.

[5]No "out-of-state" wagers were ever involved in this litigation. The monies wagered by the undercover agents (all together) amounted to less than $1,000.00 as between both the messenger service and social club enterprises.

[6]The undercover agents would place wagers at several Western locations. Almost without exception, the wagers placed at 5858 W. Fullerton were traced to racetracks. The *messenger* service employed several "runners" who had the responsibility of buying tickets at the racetracks based upon the customer's orders. Much of this communication was via the telephone. At trial, substantial evidence of "track runners" was the subject of presentation.

[7]We have already explained the 10% service charge in connection with the service performed by Western Messenger Service, Inc. "Late wagers" (otherwise called past-posting) were simply wagers taken after a race had started. A few instances of "late wagers" were presented at trial, but the government did not maintain that this was a pattern of conduct. Indeed, it makes little sense to take a "late wager" in that the customer may already be aware of the results of the race.

CLUB from approximately January-March, 1979.[8] The government's investigation terminated in approximately March, 1979 and the indictment at bar[9] was returned in September, 1979. A joint jury trial ended on October 28, 1980 with each petitioner being found guilty.

We shall briefly describe the conduct of each petitioner as demonstrated by the trial record. *Petitioner William Louis Tenuta* (hereafter W. Tenuta) was the incorporator for each corporation described in Count I of the indictment.[10] There is no question that W. Tenuta was in a supervisory and/or ownership capacity as regarding both the messenger service and the social club. At the messenger service, W. Tenuta took betting orders, acted as a cashier, and conducted himself as the owner or operator of a business.[11] Mr. L. Tenuta (a/k/a Louie the Barber) worked only at the messenger service [not at the social club]. Louie the Barbers' main task [as per the trial record] was to make sure that the customers were happy. Louie the Barber seemed primarily responsible for serving the customers pizza, McDonald's hamburgers, beer and soft drinks.[12] Almost without exception each time

---

[8] The Social Club did not employ runners, track announcers, 10% forms where the customer could request the tickets. The Social Club was, as the words imply . . . a club where persons got together and different members of the club would take wagers to the track for the benefit of one another. The Social Club charged a $20.00 membership fee (although no fee was charged for females). Thus, the enterprises were distinctly different. The panel order, affirming the convictions "stripped to essentials" misses the point (pg. 1-2). The enterprises were sufficiently different so that it was the jury . . . not either the trial court or the appellate court . . . upon proper instructions . . . to have determined the existence *vel non* of separate enterprises [or separate conspiracies].

[9] We have reproduced the multi-count indictment as app. 4.1-4.7 to this petition.

[10] Tr. 1842-1843

[11] Tr. 1312

[12] Tr. 1114-1115; Tr. 1207-1208.

the undercover IRS agents visited the Western location at 5858 W. Fullerton . . . Louie the Barber was present, in the customer area, serving food. The transcript also reveals that Louie the Barber . . . might, from time to time, be writing customer orders . . . but he was not a cashier.[13] When the social club opened, Louie the Barber was no longer to be seen.[14] Petitioner Spilotro was an employee of the Western Messenger Service, Inc. The trial record showed that he would write customer orders, work in the cashier's cage, and he was, from time to time, seen entering and leaving the "rear offices".[15] There was a reasonable question as to whether Spilotro acted in a management capacity from March-July, 1978 at the Western Messenger Service. The trial evidence showed no conduct whatsoever by Spilotro as regarding the social club.[16]

Petitioner Cibic is found only at the social club from approximately January-March, 1979. The government offered no evidence that Cibic had anything to do with the MESSENGER SERVICE.[17] Commencing February, 1979 Cibic took wagers from an undercover IRS agent at the social club.[18]

Petitioner Ms. Penny Riccio originally worked at a messenger service called Pegasus.[19] Prior to March, 1978 she became an employee of Western and she worked as a ticket writer, occasionally as a cashier and as a "recapper".[20] Penny seemed to have an apparent overall responsibility for

---

[13] Please see Tr. 180 vs. Tr. 1202.

[14] Tr. 179.

[15] Tr. 1111-1112, 1198, 1202.

[16] Tr. 1387-1390

[17] Tr. 1361-1363; 1418.

[18] Tr. 1192-1198; 1387.

[19] Tr. 1347-1357.

[20] Tr. 686, 725-733 "Recapping" is or was a means of combining all the orders taken in [by the messenger service] for an individual race (Tr. 784).

coordinating some of the operational activities at Western Messenger. However, she never took any "late bets" nor did she ever fail to charge any customer the 10% service fee.[21] Penny also worked at the social club where she accepted wagers.[22] Petitioner June Martino was employed at Pegasus, Western Messenger Service, and the Western Social Club. She worked both as an order taker and as a recapper.[23] When the messenger service closed and the social club opened (some 6 months later) she was responsible for, *inter alia*, giving membership cards and taking photographs of members.[24] At the social club, the male members paid $20.00, the female members paid nothing.[25]

The government failed to demonstrate that petitioner Cibic had anything to do with the messenger service. Petitioners Spilotro and Louie the Barber were involved only with the messenger service, not at all with the social club. W. Tenuta, Penny Riccio, and June Martino functioned at both the messenger service and the social club.

All pre-trial and trial requests for severance, mistrial, and multiple conspiracy relief or instructions were denied.[26]

---

[21] Tr. 1388-1390.

[22] Tr. 1343; 1354.

[23] Tr. 1379 (she took no late bets and she always charged 10% at the messenger service); Tr. 1369-1371, 1002-1008; 1155.

[24] Tr. 1410, 1420

[25] Tr. 1411.

[26] Pre-trial severance motions were denied without a hearing (R.90, 94, 95, 96). During trial, the court allowed a single objection to be asserted for all defendants as well as a standing objection to all conspiratorial hearsay (Tr. 30, 90, 136-137). Additional "in-trial" objections, requests, and the trial court's rulings therein are as follows: Cibic, co-conspirator requests, Tr. 137-138, 411-412, 440-443; conspiracy-limiting instruction requests, [all denied], Tr. 508-518, 600-610; mistrial motions based on admission of conspiratorial declarations, Tr. 1135; admission of co-conspiratorial declarations reviewed, Tr. 1217-1280; June Martino gambling stamp conversation with IRS Agent on June 15, 1978, Tr. 1400-1410; 1442-1446;

A.
THE JUNE 15, 1978 RAID

Several IRS agents, with the benefit of search warrants, raided approximately 16 Western Messenger Services on June 15, 1978. Several agents went to the 5858 Store at about 5:30 P.M. and seized therefrom evidence. During the raid phone calls were accepted by the agents and W. Tenuta was allowed to tell a track messenger what plays to make on wagers that had been accepted prior to the raid.[27]

Among evidence seized was currency and bet slips from the false arm in a chair located in a rear office at 5858.[28]

During the June 15, 1978 raid, an IRS Agent questioned petitioner June Martino, one of the Western employees, as regarding a wagering tax stamp. She gave no answer. The original trial judge suppressed all of this evidence (including the questions).[29] During this same raid an undercover IRS

---

additional severance requests, Tr. 1432-1439; multiple conspiracy review; 1434-1435, 1795, 1805; more severance, 1795-1799; Spilotro severance, 1536, 1813; mistrial requests becuase of prejudicial admission of conspiratorial declarations, 1834-1835 . . . and see Tr. 94-93, 148-153, 231-242.

[27] The raiding IRS agents answered any number of telephone calls wherein the individuals, calling wanted either bet results or the placing of wagers. The agents declined to give W. Tenuta the "bet orders" they had taken . . . but did allow him to tell the track messenger the bets to make for orders Tenuta had apparently taken prior to the raid. (Tr. 335-337; 882-883; 900-901; 904-906; 946; 949-950).

[28] Tr. 384-400.

[29] On March 4, 1980, Judge Bua, the original trial judge, after an evidentiary hearing, suppressed the Martino-IRS questions. Judge Bua stated:

> "THE COURT: Based on the evidence which the court has heard, the exhibits submitted in connection with the suppression hearing, the court finds that Mrs. Martino was, indeed, in a custodial setting when Agent Jones commenced to read her rights. There is no question in this court's mind that if Mrs.

Agent heard an unidentified customer state . . . the raid was because Western did not have a gambling stamp . . . Tr. 1316. This statement was made in the presence of petitioner's Tenuta and Spilotro (1316). During the same "raid" petitioner Tenuta told an IRS Agent they didn't need a federal wagering stamp because . . . we are a messenger service, not a betting service . . . (Tr. 887).

After the June 15, 1978 raid, everything went KAPUT. The Illinois Supreme Court, less than one (1) month later declared the messenger services to be illegal and WESTERN MESSENGER closed. Several months later W. Tenuta opens the social club (absent Louie the Barber and Spilotro) and, in September, 1979 a multi-count indictment is returned charging the petitioners were violating any number of federal statutes all under the umbrella of 18 U.S.C. § 371. We have reproduced the applicable statutes and the indictment at app. 3, 4, *infra*.

The trial court declined to instruct the trial jury on the

Martino attempted to walk out that door after exiting the washroom, she would have been prevented from doing so. But what really shocks the court is after she is read her rights and Mrs. Martino responds, "I don't want to talk," the agent continues to ask her a crucial question, the very question which will convict her. And I find this reprehensible, and the motion to suppress any statements made in connection with that interview will be granted.

MS. HUGO: Your Honor, would the court, in fact, reconsider its ruling if, in fact, Mrs. Martino were to take the stand and admit that she had knowledge of the fact that Western Messenger Service did, in fact, have to have a federal wagering tax stamp?

THE COURT: It would make no difference at all." (Tr. 109-110).

During the trial a different district court judge did allow the government to introduce portions of the IRS-MARTINO interview of 1978, (Tr. 1451-1458). The Court of Appeals frowned on the trial court's ruling . . . but found no prejudicial error on this case (App. 1.3).

reasonable possibility of multiple conspiracies. The trial court gave erroneous instructions [both original and supplemental] as regarding the liability for the federal wagering taxes. Based on these legal propositions the petitioners seek review.

REASONS FOR GRANTING PETITION

I

(1). WHETHER THE DENIAL OF ANY SEPARATE OR MULTIPLE CONSPIRACY INSTRUCTION(S) DENIED PETITIONERS [IN THIS CASE] FIFTH AMENDMENT DUE PROCESS OF LAW OR SIXTH AMENDMENT IMPARTIAL JURY RIGHTS?

(2). WHETHER THE CONFUSION SURROUNDING THE GIVING *VEL NON* OF SEPARATE OR MULTIPLE CONSPIRACY INSTRUCTIONS IS SUFFICIENTLY SIGNIFICANT SO THAT CERTIORARI SHOULD BE GRANTED TO REVIEW THE CONFUSION IN THE CIRCUITS AS TO WHETHER SEPARATE CONSPIRACIES ARE A QUESTION OF FACT FOR THE JURY . . . OR A QUESTION OF LAW FOR THE TRIAL COURT?

In *U.S.* v. *Cambindo Valencia*, 609 F.2d 603 (CA 2, 1979) the Court, while reversing, in part, certain drug conspiracy convictions noted:

> ". . . Despite the prodigous literature written on the subject of single and multiple conspiracies, it remains shrouded in confusion . . ." (609 at 621).

The crux of this issue is whether separate or multiple conspiracies revolve within "fact" question(s) to be determined by the jury . . . or "law" question(s) to be determined by the trial court.

During an evidentiary argument the trial court noted:

> "THE COURT: That is a separate point altogether. If there are two conspiracies, then all defendants have a reason to complain there. That simply is that there

would be a variance between the charge and the proof. So far, I don't see two conspiracies here." (Tr. 1434).

During argument on motions for judgment of acquittal[30] the trial judge stated:

> "THE COURT: Well, I'm going to deny both motions.
>
> On the motion for acquittal, I think you're running up against the rule that you don't have to be a member at the start, and if you arrive late and join with knowledge of the purpose of the thing, you're criminally responsible.
>
> Now, I also think that there's no evidence that there were two conspiracies here.
>
> I would concede that if he just joined a separate second conspiracy, and was not part of the first one—or, rather, if the so-called second was unrelated to the first one, I think there would be a problem. But I don't see that here.
>
> There either was no conspiracy or there was one continuing conspiracy, as I see this evidence; and I think it would confuse the jury to give a two-conspiracy instruction in this case." (Tr. 1805-1806).

During additional colloquy on judgment of acquittal *vel non* the Court opined:

> " . . . because I think the evidence does establish all one conspiracy here, if there is a conspiracy . . . " (1809).

During the instruction conference the defense offered multiple conspiracy instructions (and variations thereof) as well as specific separate defense instructions which would have directed the jury to decline to hold some of the evidence against some of the petitioners (Tr. 2064-2067).

In this case the trial court had previously stated [as regarding the possibility of multiple conspiracies, that if multiple conspiracies were present in this case] . . . "then all defendants have a reason to complain" (Tr. 1434).

When the trial judge made that statement the petitioners were urging a multi-conspiracy argument. While it may

---

[30] All motions for judgment of acquittal, severance or mistrial were denied (Tr. 1794-1825).

well be unnecessary to further detail the suggested participation of the petitioners we nevertheless are compelled to note:

A). Petitioner Cibic had nothing whatsoever to do with the messenger service;

B). Petitioners Louis (the Barber) Tenuta and Spilotro had nothing whatsoever to do . . . with the social club;

C). There was a clear and unmistakable six (6) months hiatus as between the messenger service closing and the social club opening;

D). And there was an absolute distinction in the method of operation as between the messenger service and the social club;

E). NEITHER BETS NOR WAGERS WERE RECEIVED FROM JULY 15, 1978 (CLOSING OF MESSENGER SERVICE) UNTIL THE SOCIAL CLUB OPENED (DECEMBER, 1978 TO MARCH, 1979) . . . AND ONLY MEMBERS AND NOT THE GENERAL PUBLIC WERE ADMITTED INTO THE SOCIAL CLUB.

The petitioners respectfully point out that almost every circuit court has found that the question of separate or multiple conspiracies, in any particular case, . . . is a question of fact for the jury[31] . . . not a question of law for the court.

---

[31] E.g., *U.S.* v. *Brown*, 495 F.2d 593 at 598, n.5 (CA 1, 1974); *U.S.* v. *Armedo-Sarmiento*, 545 F.2d 785 at 789 (CA 2, 1976) . . . but see *U.S.* v. *Cambindo Valencia*, 609 F.2d at 621 (CA 2, 1979); *U.S.* v. *Coward*, 630 F.2d 229 (CA 4, 1980); *U.S.* v. *Nettles*, 570 F.2d 547 (CA 5, 1978); *U.S.* v. *Levine*, 546 F.2d 658 (CA 5, 1977); *U.S.* v. *Eubanks*, 591 F.2d 513 (CA 9, 1973) (concurring opinion by C. J. Ely, 591 F.2d at 521-524) (reviewing total hazards of multiple conspiracies). In *U.S.* v. *Varelli*, 407 F.2d 735 at 746 (CA 7, 1969), the Court, while setting aside a series of federal convictions noted:

> *"Since the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several.* (citations omitted). Therefore, the district judge should not under F. R. of Crim.P.14 grant a severance or order "an election by the Government of the conspiracy it would prosecute" (citation omitted)

The danger of sacrificing individual justice arises most frequently in a case such as this, where questions are raised as to whether there was one single conspiracy or several minor conspiracies. The probability of prejudice which arises from the inevitable insinuation of guilty by association because evidence is admissible in the single overall conspiracy against defendants who had no part in something ... understandably makes the conspiracy charge ... the darling of the modern prosecutor's nursery.[32] A conviction must rest on individual guilty beyond a reasonable doubt, not mass guilt.[33] The prejudice to an individual defendant forced to defend himself at a joint trial with numerous other alleged co-conspirators is compounded in instances where, as here, the proof readily indicates the existence of a number of small conspiracies ... rather than a single conspiracy as charged by the government.[34] The danger of inferring guilt from one co-defendant to another increases in proportion to the number of persons compelled to stand trial together and the danger of guilt by association at a multiple defendant trial intensifies as the number of possible conspiracies ... grow. The tendency for a jury to believe that a defendant must have been involved in an alleged all-encompassing conspiracy, once it finds that the individual defendant committed one of the minor acts involved ... is the very heart of the single

---

but, when the possibility of a variance appears should instruct the jury on multiple conspiracies as well" (407 F.3d at 746; emphasis ours).

[32] *Harrison* v. *U.S.*, 7 F.2d 259 at 263 (CA 2, 1925) (Learned Hand, J.).

[33] *Kotteakos* v. *U.S.*, 328 U.S. 750 at 774 (1946).

[34] The prosecution at bar included a violation of 18 U.S.C. § 1955. The government, under the umbrella of a single conspiracy, was thus able to satisfy the five or more ... person requirement. Had the case been properly separated all the SOCIAL CLUB EVIDENCE would have been excluded based on the inability of the government to satisfy the jurisdictional requirement of 5 or more persons ... as per 18 U.S.C. § 1955(b)(1)(ii).

charged-multiple conspiracy issue.[35] The prosecution contended here that everything that occurred was an extension of the single overall conspiracy. Nothing could be further from the truth. How could petitioner Cibic be part of an overall single conspiracy when the government failed to demonstrate by even a *scintilla* of evidence that he had anything to do with . . . or even knew about the messenger service . . . that had closed pursuant to the Illinois Supreme Court mandate at least six (6) months prior to Cibic first encountering any undercover IRS agent. Even further, how could petitioners "Louie the Barber" and Spilotro. . .be "saddled" with the SOCIAL CLUB EVIDENCE when the government never offered a shred of evidence that either of these petitioners had anything whatsoever to do with the social club.[36] Judge [Justice] Stevens, in *U.S.* v. *Johnson,*[37] wrote, while reversing in part, certain federal theft convictions:

> "We therefore agree without reservation with appellant's argument that the evidence was insufficient to establish his participation in the single overall conspiracy charged in the indictment.
>
> It necessarily follows that appellant was entitled to have the jury instructed that evidence which related

---

[35] *Blumenthal* v. *U.S.*, 332 U.S. 539, 559 (1947).

[36] The social club corporation was not opened to the public, was a membership only club, and charged nothing for transmitting bets to the local racetracks. If the social club was operating in violation of Illinois law, then the government had to demonstrate the jurisdictional elements for a successful prosecution under 18 U.S.C. § 1955. Certainly, the government failed in that regard. Petitioners Louie the Barber and Spilotro were nevertheless "saddled" with this evidence against them . . . because of the theory of prosecution below. Petitioner Cibic, for all anyone knows, was absolutely unaware of even the existence of the messenger service . . . nevertheless, Cibic was "saddled" with the evidence indicating that some of the messenger service wagers . . . never made it to the track.

[37] 515 F.2d 730 (CA 7, 1975).

> only to the A&J transactions was not admissible against him. It was plain error to fail to give such an instruction. Moreover, in the absence of such an instruction, we cannot possibly be sure that the jury's verdict on the conspiracy count was unaffected by that evidence. Both the quality and the character of that evidence unquestionably increased the likelihood that the jury would find appellant guilty of conspiracy with Altvare. For, under the court's instructions, the jury may have inferred that appellant and the A&J defendants were members of the same conspiracy simply because they both obtained stolen Cadillacs from Altvare. With the A&J evidence excluded, the jury might not even have been persuaded beyond a reasonable doubt that Altvare was the source of appellant's contraband.

(515 F2d 733-734, n.s. omitted).

* * * *

For it is clear that there are cases in which a variance involving only two conspiracies is sufficiently prejudicial to require reversal, and it is equally clear that the adequacy of the trial judge's instructions are of critical importance in evaluating the likelihood of confusion or prejudice. In *Blumenthal* v. *United States*, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154, for example, the Court's determination of no prejudice in a case arguably involving two conspiracies relied heavily on the assumption that the jury faithfully followed the Court's direction not to consider the admissions of Goldsmith and Weiss when passing on the guilt or innocence of Blumenthal, Feigenbaum and Abel. The Court plainly stated, however, that a failure to instruct the jury to disregard the evidence which was not admissible against Blumenthal, Feigenbaum and Abel would have required reversal as to them. We think the failure in this case to instruct the jury to disregard the evidence concerning Altvare's activities with other defendants, summarized in our quotation from the government brief

> in n. 12, *supra*, likewise requires reversal of appellant's conspiracy conviction. The Supreme Court's analysis of the prejudice question in both *Kotteakos* and *Blumenthal* forecloses an interpretation of *Berger* that would treat every two-conspiracy variance as harmless error."

(515 F2d at 735, n.s. omitted).

In the instant case the jury was instructed THAT THEY SHOULD CONSIDER the evidence in both the messenger service and the social club against each petitioner in this case. Cautionary instructions and multi-conspiracy instructions to the contrary . . . were not allowed. The Courts charge to the jury in effect, directed the jury to consider all the conduct against each petitioner on trial.[38] This Court's decision in *Blumenthal* sustained the convictions in that case only because the trial court there directed the jury *not* to consider certain evidence against *Blumenthal* and others. In *Blumenthal* this Court noted that *but for* those instructions reversal would be required.[39] Certainly as to petitioners Cibic, Louie the Barber Tenuta, and Spilotro . . . the absence of cautionary instructions as well as the absence of any multiple conspiracy instruction suggests that the granting of a new trial is appropriate.[40]

---

[38] In effect, the trial judge by refusing to charge on separate or multiple conspiracies, or at the very least using *Blumenthal* to direct the jury not to consider certain evidence against one or the other petitioner in this case . . . directed a verdict of guilty in this case. Of course, this cannot be done without violating the Sixth Amendment, *U.S.* v. *Spock*, 416 F.2d at 180-183 (CA 1, 1969). Thus the constitutional basis for the claimed violation encompasses the Sixth Amendment as well as due process aspects of the Fifth Amendment.

[39] *Blumenthal* v. *U.S.*, 332 U.S. 539 at 551, 68 S. Ct. 248 at 253 (1947).

[40] The Court of Appeals for the Seventh Circuit while affirming this conviction in an unpublished order stated that there was no error because a rational jury could not have found two (2) separate conspiracies and therefore the petitioners were not entitled to a two

II

(1) WHETHER VIOLATIONS OF 26 U.S.C. § 7203 CAN BE SUSTAINED WHERE THE TRIAL COURT DECLINED TO CHARGE THE JURY AS REGARDING ANY EXCEPTIONS TO LIABILITY UNDER 26 U.S.C. §§ 4411, 4412 (CONTRARY TO *INGRAM* v. *U.S.*, 360 U.S. 672 (1959)).

(2) WHETHER VIOLATIONS OF 26 U.S.C. § 7203 CAN BE SUSTAINED WHERE THE TRIAL EVIDENCE SHOWS THAT EACH PETITIONER WAS EMPLOYED BY A REGISTERED ILLINOIS CORPORATION AND THAT THE RACETRACK MESSENGER SERVICE WAS NOT ILLEGAL UNDER THEN-EXISTING STATE LAW?

(3) WHETHER A PERSON MAY STAND CONVICTED OF VIOLATING 26 U.S.C. § 7203 WHERE THE GOVERNMENT FAILS TO SHOW EITHER KNOWLEDGE OR ANY PROPRIETARY INTEREST AS REGARDING THE NEED FOR REGISTERING OR PAYING ANY SPECIAL EXCISE TAX UNDER 26 U.S.C. § 4401, ET SEQ.?

This court has not reviewed 26 U.S.C. § 4401, et seq. since *Marchetti*[41] and *Grosso*.[42] This case may be an appropriate vehicle for reviewing the uncertainty of the gambling stamp registration provisions of the present Internal Revenue Code. Certainly the Court of Appeals in this case declined to follow

---

(2)-conspiracy charge (App. 1-1.2). The Court of Appeals perpetuated the trial judges error in declining to properly charge the jury in this case. It is neither for the trial judge nor the Court of Appeals to remove from the jury's consideration a question of fact. To do so is tantamount to directing a verdict of guilty. To be sure, the trial court cannot do that, *United Brotherhood of Carpenters, et al.* v. *U.S.*, 330 U.S. 395, 408, 67 S. Ct. 775 (1947); *U.S.* v. *Spock, 416 F.2d 165, 180 (CA 1, 1969).*

[41] *Marchetti* v. *U.S.*, 390 U.S. 39, 88 S. Ct. 697 (1968).

[42] *Grosso* v. *U.S.*, 390 U.S. 62, 88 S. Ct. 709 (1968).

either *Ingram*[43] or *Calamaro.*[44] The facts in this case show that the petitioners were employees of separate Illinois corporations. These corporations [Western Messenger Service, Inc., and Western Social Club, Inc.] were doing business in Illinois from March 1978 through July 14, 1978 (Western Messenger Service) and then from approximately January 1979 through March 1979 (Western Social Club).

Each petitioner (save for Cibic) was charged in Count Two with violating 26 U.S.C. § 7203 for the period of March-June 30, 1978. The underlying subject violation was 26 U.S.C. § 4412 (failing to register). In Count Four each petitioner (save for Cibic) was charged with violating 26 U.S.C. § 7203 . . . in that each petitioner failed to pay the five hundred dollar ($500.00) special tax as per 26 U.S.C. § 4411 . . . from March-June, 1978.[45]

Each petitioner, in Counts Three and Five were charged with violating 26 U.S.C. § 7203 in that they failed to follow 26 U.S.C. § 4411 (payment of $500.00), and 26 U.S.C. § 4412 (failing to register) for the periods of time from July 1, 1978-June 30, 1979. Once again, the government divided the "essential same" offenses into separate crimes (see N.44, *infra.*).

Each petitioner was employed by an Illinois Corporation. Those corporations bore the responsibility of profit or loss. Treasury regulations provide that in order for a person to be "in the business of accepting wagers" he must "(make) it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the

---

[43] *Ingram* v. *U.S.*, 360 U.S. 672, 79 S. Ct. 1314 (1959).

[44] *U.S.* v. *Calamaro*, 354 U.S. 351, 77 S. Ct. 1138 (1957).

[45] Thus, separate counts charging the same petitioners with slightly different . . . but related offenses for the same periods of time (March-June, 1978). It is also clear that from March-June, 1978 the conduct of the petitioners was not the subject of proscription by the State of Illinois. It is unlikely that the government can *carve out* separate offenses for the same conduct without violating *Sanabria* v. *U.S.* 437 U.S. 54, 98 S. Ct. 2170 (1978).

event or contest with respect to which the wager is accepted," 26 C.F.R. § 44.4401-2(b).

The petitioners point out that the court, during argument on the question of an appropriate supplemental jury instruction, stated:

> "Now if the government has to show who profited here, there probably has been a failure of proof."

Indeed, there was a "failure of proof" because the government offered . . . not a word . . . about who, if anyone, profited in connection with either the WESTERN MESSENGER SERVICE INC. or the WESTERN SOCIAL CLUB, INC.

In *U.S.* v. *Calamaro*, 354 U.S. 351 (1957) the Court affirmed a circuit court decision . . . reversing a similar conviction under an earlier [but strikingly similar] series of IRS statutes.[46] In *Calamaro* the Court found that the "pick-up man" was exempt from the statutory scheme in that, *inter alia*, he [the pick-up man] had no proprietary interest in . . . the numbers enterprise. In addition, the court further held:

> "In conclusion, we cannot accept the alternative reasoning of the dissenting judge below who, relying on that part of the opinion in Daley v. United States, 1 Cir., 231 F.2d 123, 128, relating to the trial court's charge to the jury in a prosecution for failing to pay the § 3285 excise tax, regarded the respondent's conviction here as sustainable also on the theory that he was a person "engaged in the business of accepting wagers" within the meaning of § 3285(d). The Government disclaims this ground for upholding the respondent's conviction, as indeed it must, in light of the unambiguous legislative history showing that the excise tax applies only to one who is "engaged in the business of accepting wagers" as a "principal * * * on his own account." In this instance, that means the banker, as the Government concedes.

---

[46] The predecessor statutory scheme (26 U.S.C. § 3285, *et seq.)* is considered in *Calamaro* to be akin to the statutory scheme reviewed in this case . . . 354 U.S. at 358, 359; 77 S. Ct. at 1143.

> We hold, therefore, that the occupational tax imposed by § 3290 does not apply to this respondent as a pick-up man, and that the judgment below must accordingly be affirmed."
>
> (354 U.S. at 359, 360)

In this case only petitioner W. Tenuta could arguably be considered as having a proprietary interest in that W. Tenuta was the incorporator of each Illinois corporation in this case (Western Messenger Service and Western Social Club). No other petitioner in this case was even arguably shown to have any interest in the corporate enterprises . . . other than as an employee. The petitioners Ms.(s) Riccio and Martino as employees of Western Messenger Service always charged the 10% service fee and never took any late wagers (Tr. 1379, 1388-1390). Petitioner . . . Louie the Barber Tenuta . . . served pizza and hamburgers. It is inconceivable that these petitioners could be liable for either registration or payment under 26 U.S.C. § 4411, 4412 . . . when their status was conceivably less than that of Mr. Calamaro . . . who was a "pick up man" in the numbers game described by the Court in *Calamaro ante* . . . 354 U.S. at 353, 354.[47]

In *Ingram* v. *U.S.*, 360 U.S. 672 (1959) the Court reversed the conspiracy convictions as to certain of the petitioners (Messrs. Smith and Law). The Court, while reversing, found that Smith and Law certainly were part of an illegal local numbers game . . . but the question was whether there was a conspiracy with a purpose . . . illegal under federal law (360

---

[47] It is curious to note how the government disavows petitioner Cibic's position in this SINGLE CONSPIRACY. The Government did not charge Cibic in Counts Two and Four . . . for the periods of time from March-June, 1978 . . . with the substantive counts of 26 U.S.C. § 7203. Thus the government, *sub silentio*, leaves Cibic out of the messenger service in the substantive counts . . . acknowledging his lack of knowledge and participation . . . but nevertheless, successfully urge that the trial court decline a separate conspiracy approach as to Count One (charging violations of 18 U.S.C. §§ 371, 1955). How can the government have it both ways in the same case?

U.S. at 677-678). The Court also made clear that the record was "completely barren" of any direct evidence of . . . such knowledge (the knowledge required to conspire to violate the federal wagering tax laws . . . 360 U.S. at 673). Of equal import . . . or perhaps, for the purpose of this case, greater import, is a statement by the Court as regarding jury instructions. In part, this Court noted:

> "The trial took place subsequent to the announcement of this Court's decision in *United States* v. *Calamaro*, 354 U.S. 351, 77 S.Ct. 1138, 1 L.Ed.2d 1394, and the district judge correctly instructed the jury that conviction of the substantive offenses would be justified only as to any defendants found to be "writers," "bankers," or to have "a proprietary interest in such lottery operation."
>
> (360 U.S. at 675)

In the case at bar the trial court made absolutely no distinction as to . . . writers, bankers, pick up persons . . . or those persons with a proprietary interest (cf., *Ingram*, 360 U.S. at 675). In other words, when the trial court charged the jury in this case, the trial court made no distinction as to any of the petitioners and any of their functions within the context of 26 U.S.C. §§ 4411, 4412 . . . as purported violations of 26 U.S.C. § 7203. The Court's charge to the jury on the substantive counts is found from Tr. 2191-2195 (reproduced at App. 5, *infra*). During jury deliberations, the jurors sent a note which read:

> "Where does the responsibility lie for the registration and payment of the $500 taxes? Is it per person or for the company on behalf of his employees? If it is the company on its behalf of its employees, are only the registered officers responsible?" Signed Winifred Ellis.
>
> (Tr. 2201)

The trial judge [over objection] in response to the note then charged the jury:

> "The law imposes liability for the tax upon anyone who knowingly engages in the conduct of an illegal gambling business by accepting wagers on a regular basis. Each person who knowingly accepts wagers on a

regular basis in the conduct of an illegal gambling business is liable for a $500 tax. This includes low-level employees as well as bosses so long as they accept wagers on a regular basis and realize that they are thereby participating in an illegal gambling business.

The test is whether they knowingly accept wagers on a regular basis in an illegal gambling business.

The fact that the business may be carried on in the name of a corporation does not relieve the individual participants from liability for the tax. The corporation is liable, but so are the individuals.

The requirement to register—this is the separate requirement to register—is imposed upon the gambling business. If the business is registered, those who accept wagers on a regular basis on behalf of the business need not register. However, if the business is not registered, then each person who knowingly accepts wagers on behalf of the business on a regular basis is obligated to register separately."

(Tr. 2214-2215)

After giving this charge to the jury, the trial judge told counsel:

"You may disagree with what the question was, but I think I answered their question. Whether I answered correctly or not is for someone else to say". (Tr. 2215-2216).

It is clear as a bell, that under *Ingram* the instructions were absolutely incorrect.

In *Bollenbach* v. *U.S.*, 326 U.S. 607, 66 S. Ct. 402 (1946) the Court reversed a stolen securities conviction while reminding us:

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue" (66 S. Ct at 405).

In the instant case the charge to the jury on the substantive counts was not . . . equivocal . . . it was clearly and manifestly error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLAN A. ACKERMAN
100 N. LaSalle St.
Suite 611
Chicago, Illinois 60602
(312) 332-2863

SANTO J. VOLPE
105 W. Madison
9th Fl.
Chicago, Illinois 60602
(312) 641-5411

FOR THE PETITIONERS.

Appendix

Appendices

IN THE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

No. 81-1002

Argued January 6, 1982
Decided January 21, 1982

Before

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. HOWARD T. MARKEY, *Chief Judge**
HON. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR P. SPILOTRO, WILLIAM LOUIS TENUTA, LOUIS TENUTA, PENELOPE A. RICCIO, JUNE MARTINO, and EMIL D. CIBIC,
Defendants-Appellants.

Appeal from the United States District Court for The Northern District of Illinois, Eastern Division.

No. 79 CR 559-1

John F. Grady, *Judge.*

ORDER

The six defendants were convicted of various federal offenses relating to gambling and appeal to this court.

Stripped to essentials, the case involves an alleged bookmaking operation carried out under two purportedly legitimate fronts—initially, a bet messenger service, and after that was closed down by operation of Illinois law, a social club. The bookmaking operation was alleged in the indictment to be a single conspiracy to engage in illegal gambling, and the defendants' principal contention on this appeal is that the district court erred in failing to instruct the jury to

* Of the United States Court of Customs and Patent Appeals.

consider the possibility that there were two conspiracies rather than one. The result of the court's ruling was that evidence relating to the messenger service was allowed to be considered in relation to the social club and vice versa, as the jury might not have done if it had the option to find two conspiracies, one limited to the messenger service and one to the social club. Here, however, unlike *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969), on which the defendants principally rely, the evidence was overwhelming that there was one conspiracy, not two; the social club being merely a continuation of the messenger service in another guise after the messenger service was closed down by operation of law. A rational jury could not have found two separate conspiracies and the defendants were therefore not entitled to have a two-conspiracy charge. For the same reason, it is no defense to the indictment that Cibic was linked only to the social club; he was simply a late joiner of a conspiracy that had begun when the messenger service was started, and he has the same liability as the charter conspirators.

The defendants also complain about the refusal of the prosecution to turn over to them several reports prepared by government agents in preparation for the trial. Only one of these need be discussed, a prosecution memorandum summarizing the evidence in the case and signed by, among others, the IRS undercover agent who was the principal witness for the government at trial. Perhaps technically this report should have been turned over to the defense under the Jencks Act, 18 U.S.C. § 3500. But since the relevant portion was merely an index to the agent's evidentiary summaries which were turned over to the defense, "it is perfectly clear that defendant has not been prejudiced by the error." *United States* v. Cleveland, 507 F.2d 731, 741 (7th Cir. 1974).

The most substantial issue in the case is defendant Martino's *Miranda* claim. In a visit to the messenger service premises pursuant to a search warrant an IRS agent asked Martino why the service did not have a federal wagering tax stamp, and she replied, "We have one, don't we?" Her motion to suppress her statement, made before trial, on the ground

that is was the product of a custodial interrogation and she had not been given her *Miranda* warnings, was granted. But the agent was permitted to testify at trial, not to her reply, but to his statement, to show that the defendants were thereafter on notice that the stamp was needed for such a gambling operation. Arguably this was a "use" of Martino's statement, in violation of her *Miranda* rights, since the jury may have been curious as to her reply, and why there was no testimony from her regarding it. We do not approve of what seems a rather transparent effort on the part of the government to get some mileage out of what was held to be an improper interrogation. But the evidence against Martino was so strong that this impropriety on the part of the government was harmless error.

The other issues raised by the appeal are patently without merit and do not require discussion. The judgment is affirmed.

IN THE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

No. 81-1002

February 16, 1982
Before

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. HOWARD T. MARKEY, *Chief Judge**
HON. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

VICTOR P. SPILOTRO, WILLIAM LOUIS TENUTA, LOUIS TENUTA, PENELOPE A. RICCIO, JUNE MARTINO, AND EMIL D. CIBIC,
Defendants-Appellants.

Appeal from the United States District Court for The Northern District of Illinois, Eastern Division.

No. 79 CR 559-1

John F. Grady, *Judge.*

The defendants-appellants, Victor P. Spilotro, William Louis Tenuta, Louis Tenuta, Penelope A. Riccio, June Martino, and Emil D. Cibic have filed a petition for rehearing and suggestion for rehearing *in banc* on January 29, 1982. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court have requested a vote on the petition. The petition is therefore DENIED.

---

* Of the United States Court of Customs and Patent Appeals.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

§ 4401. Imposition of tax

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 2 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with

him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

§ 4402. Exemptions

No tax shall be imposed by this subchapter—

(1) Parimutuels.—On any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

(2) Coin-operated devices.—On any wager placed in a coin-operated device (as defined in section 4462 as in effect for years beginning before July 1, 1980), or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462 (a)(2) (as so in effect), or

(3) State-conducted lotteries, etc.—On any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

§ 4411. Imposition of tax

There shall be imposed a special tax of $500 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Aug. 16, 1954, c. 736, 68A Stat. 527; Oct. 29, 1974, Pub.L. 93–499, § 3(b), 88 Stat. 1550.

§ 4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in

charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, the Secretary may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

Aug. 16, 1954, c. 736, 68A Stat. 527; Oct. 4, 1976, Pub.L. 94–455, Title XIX, § 1906(b)(13)(I), 90 Stat. 1835.

§ 4413. Certain provisions made applicable

Sections 4901, 4902, 4904, 4905, and 4906 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. No other provision of sections 4901 to 4907, inclusive, shall so extend or apply.

Aug. 16, 1954, c. 736, 68A Stat. 527.

§ 4902. Liability of partners

Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax.

Aug. 16, 1954, c. 736, 68A Stat. 593.

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

IN THE

United States District Court

Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,
v.
VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA,
also known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,
JUNE MARTINO, and
EMIL D. CIBIC

No. 79 CR 559

Violation: Title 18, United States Code, Section 371 and Title 26, United States Code, Section 7203.

The SPECIAL FEBRUARY 1977 GRAND JURY charges;

1. From on or about March 1, 1978, and continuing thereafter to and including March 7, 1979, the exact dates being to the grand jury unknown, in the Northern District of Illinois, Eastern Division; and elsewhere,

VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA,
also known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,
JUNE MARTINO, and
EMIL D. CIBIC,

defendants herein, did knowingly, willfully and unlawfully combine, conspire, confederate and agree together and with

each other and with diverse other persons, whose names are to the grand jury both known and unknown, to commit an offense against the United States, that is to knowingly, willfully and unlawfully conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business, such business involving five or more persons in its conduct, financing, management, supervision, direction and ownership, having been in substantially continuous operation for a period in excess of 30 days, and being in violation of the following laws of the State of Illinois: Illinois Revised Statutes, Chapter 38, Sections 28-1(a)(1), (2); (5) and (1), 38-1.1(b) and (d), and 28-3, in violation of Title 18, United States Code, Section 1955.

2. It was further a part of the conspiracy that the defendants,

VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA, also
known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,
and JUNE MARTINO,

would and did, from on or about March 1978 through June 1978, operate Western Racetrack Agents, Inc., also known as Western Messenger Service, Inc. as a "front" for their illegal gambling, that is the defendants would and did represent and cause Western Messenger Service, Inc. to represent that it was a legitimate messenger service which took all horse wagers placed at its storefronts to Chicago area racetracks to be bet at pari-mutuel windows when, in fact, as defendants well knew, a large number of wagers placed at the Western storefronts were not taken to Chicago area racetracks and bet at the pari-mutuel windows, but were retained by defendants, or "booked", in violation of the Illinois and federal law.

3. It was further a part of the conspiracy that the defendants,

VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA, also
known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,
JUNE MARTINO, and
EMIL D. CIBIC,

would and did, from on or about December 1978 through March 1979, operate Western Social Club, Inc. as a "front" for their illegal gambling, that is the defendants would and did represent and cause Western Social Club to represent that it was a club and that horse wagers made by its members would be taken to Chicago area racetracks and placed at the pari-mutuel windows when, in fact, as defendants well knew, a large number of wagers were not taken to Chicago area racetracks and bet at the pari-mutuel windows but were retained by defendants, or "booked", in violation of Illinois and federal law.

4. It was further a part of the conspiracy that defendant Louis Tenuta would and did register with the Secretary of the State of Illinois as the President of Western Messenger Service, Inc., that defendant William Louis Tenuta would and did register with the Secretary of the State of Illinois as the Registered Agent of Western Social Club, Inc., and that defendant Victor P. Spilotro would and did conceal the fact that he managed, directed, participated in and otherwise conducted the illegal gambling business.

5. It was further a part of the conspiracy that defendants would and did accept horse wagers at the Western Messenger Service storefront at 5858 West Fullerton, Chicago, Illinois.

6. It was further a part of the conspiracy that defendants would and did operate Pegasus Messenger Service.

7. In furtherance of and to effect the objects of this conspiracy in the Northern District of Illinois, the defendants committed the following overt acts:

a. On or about March 6, 1978, defendant Victor P. Spilotro paid out on a winning horse wager at Western

Messenger Service, Inc. at 5858 West Fullerton, Chicago, Illinois.

b. On or about April 18, 1978, defendant Penelope A. Riccio accepted money for a horse wager at Western Messenger Service, Inc. at 5858 West Fullerton, Chicago, Illinois.

c. On or about April 24, 1978, defendant William Louis Tenuta accepted money for a horse wager at Western Messenger Service, Inc. at 5858 West Fullerton, Chicago, Illinois.

d. On or about April 25, 1978, defendant Victor P. Spilotro accepted money for a horse wager at Western Messenger Service, Inc. at 5858 West Fullerton, Chicago, Illinois.

e. On or about July 14, 1978, defendant June Martino accepted money for a horse wager at Western Messenger Service, Inc. at 5858 West Fullerton, Chicago, Illinois.

f. On or about August 3, 1978, defendant Louis Tenuta had a conversation with Internal Revenue Service Special Agent DiPasquale.

g. On or about December 21, 1978, defendant William Louis Tenuta accepted money for a horse wager at Western Social Club, Inc. at 5858 West Fullerton, Chicago, Illinois.

h. On or about February 27, 1979, defendant Emil D. Cibic accepted money for a horse wager at Western Social Club, Inc. at 5858 West Fullerton, Chicago, Illinois.

i. On or about March 5, 1979, defendant Emil D. Cibic accepted money for a horse wager at Western Social Club, Inc. at 5858 West Fullerton, Chicago, Illinois.

j. On or about March 7, 1979, defendant William Louis Tenuta accepted money for a horse wager at Western Social Club, Inc. at 5858 West Fullerton, Chicago, Illinois.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

The SPECIAL FEBRUARY 1977 GRAND JURY further charges:

That from March 1978 through June 30, 1978, in the Northern District of Illinois, Eastern Division,

VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA, also
known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,
and JUNE MARTINO,

defendants herein, each being engaged in the business of accepting wagers in the Northern District of Illinois, Eastern Division, and by reason of such activity each being required under Title 26, United States Code, Section 4412, to register with the District Director of the Internal Revenue Service, Chicago, Illinois, did willfully fail to register and supply the required information at the time required by regulations of the Internal Revenue Service, that being on or before the first day in which each defendant engaged in the business of accepting wagers.

In violation of Title 26, United States Code, Section 7203.

COUNT THREE

The SPECIAL FEBRUARY 1977 GRAND JURY further charges:

That from July 1, 1978 through June 30, 1979, in the Northern District of Illinois, Eastern Division,

VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA, also
known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,

JUNE MARTINO, and
EMIL D. CIBIC,

defendants herein, each being engaged in the business of accepting wagers in the Northern District of Illinois, Eastern Division, and by reason of such activity each being required under Title 26, United States Code, Section 4412, to register with the District Director of the Internal Revenue Service, Chicago, Illinois, did willfully fail to register and supply the required information at the time required by regulations of the Internal Revenue Service, that being on or before the first day in which each defendant engaged in the business of accepting wagers.

In violation of Title 26, United States Code, Section 7203.

COUNT FOUR

The SPECIAL FEBRUARY 1977 GRAND JURY further charges:

That from March 1978 through June 30, 1978, in the Northern District of Illinois, Eastern Division,

VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA, also
known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,
and JUNE MARTINO,

defendants herein, each being engaged in the business of accepting wagers in the Northern District of Illinois, Eastern Division, and by reason of such activity each being required under Title 26, United States Code, Section 4411, to pay a special occupational tax of $500 per year, did willfully fail to pay the tax, at the time required by regulations of the Internal Revenue Service, that being on or before the first day in which each defendant engaged in the business of accepting wagers.

In violation of Title 26, United States Code, Section 7203.

COUNT FIVE

The SPECIAL FEBRUARY 1977 GRAND JURY further charges:

That from July 1, 1978 through June 30, 1979, in the Northern District of Illinois, Eastern Division,

VICTOR P. SPILOTRO,
also known as Vic Spilotro,
WILLIAM LOUIS TENUTA,
also known as Lou Tenuta,
LOUIS TENUTA, also
known as Louie the Barber,
PENELOPE A. RICCIO,
also known as Penny Riccio,
JUNE MARTINO, and
EMIL D. CIBIC,

defendants herein, each being engaged in the business of accepting wagers in the Northern District of Illinois, Eastern Division, and by reason of such activity each being required under Title 26, United States Code, Section 4411, to pay a special occupational tax of $500 per year, did willfully fail to pay the tax, at the time required by regulations of the Internal Revenue Service, that being on or before the first day in which each defendant engaged in the business of accepting wagers.

In violation of Title 26, United States Code, Section 7203.

A TRUE BILL:

MARY J. WALGENBACH
FOREPERSON

THOMAS P. SULLIVAN
UNITED STATES ATTORNEY

violation of Title 25, United States Code, Section 7203.

Now, Count V, the last and final count of the indictment, makes the same kind of charge for the period from July 1, 1978, through June 30, 1979; names the same defendants but adds the defendant, Emil D. Cibic. And I will not read that count bec ase you will have it with you when you go back to the jury room.

Now, Counts II, III, IV, and V charge a violation of a federal tax statute, Title 26, United States Code, Section 7203, which provides in relevant part:

Any person required under this title including Title 26, United States Code, Section 4411 and 4412, to pay any tax or required by this title or by any regulations made under authority thereof to make a return, keep any records or supply any information, who willfully fails to pay such tax, make such return, keep such records or supply such information at the time or times required by law or regulation shall be guilty of a crime.

So, in other words, two kinds of obligations: 1, to register; 2, to pay a tax. Whoever willfully fails to do either or both violates those statutes provided he or she is a person required by the statute to pay the tax or furnish the information or register or whatever it happens to be.

Now, Counts II and III, and here we get to the question of who has to do these things—

Counts II and III refer to Title 26, United States Code, Section 4412, which provides in relevant part:

> A. Requirement; each person required to pay a special tax under Title 26, United States Code, Section 4411, shall register on or before the first day in which he engages in the business of accepting wagers with the official in charge of the Internal Revenue District: 1, his name and place of residence; 2, if he is liable for the tax because he is engaged in the business of accepting wagers, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and, 3, if he is

engaged in receiving wagers on behalf of any person liable for the tax because he is engaged in the business of accepting wagers, the name and place of residence of each such person.

Counts IV and V refer to Title 26, United States Code, Section 4411, which provides in relevant part:

> There shall be imposed a special tax of $500 per year to be paid on or before the first day in which he engages in the business of accepting wagers by each person who is engaged in the business of accepting wagers or who is engaged in receiving wagers for or on behalf of any person so liable.

Counts II, III, IV and V, use the phrase, engaged in the business of accepting wagers. For purposes of this case, that phrase means engaged in an illegal gambling business.

The reference to "business" is intended to exclude those who accept bets only on rare occasions.

To convict any defendant of the crime of willful failure to furnish information, the government must prove beyond a reasonable doubt the following three things:

1. That the defendant was engaged in the business of accepting wagers in violation of the laws of the State of Illinois.

2. The defendant knew of his or her duty to register and supply information.

3. The defendant willfully failed to register with the District Director of Internal Revenue and to supply information as to the acceptance of wagers.

To convict any defendant of the crime of willful failure to pay an occupational tax imposed on wagering, the government must prove each of the following propositions beyond a reasonable doubt:

1. That the defendant was engaged in the business of accepting wagers in violation of the laws of the State of Illinois.

2. The defendant knew of his or her duty to pay the special occupational tax imposed upon accepting wagers.

3. That the defendant willfully failed to timely pay such tax.

An act is done willfully, and you will recall that each of those tax statutes uses the term "willfully."

An act is done willfully if it is done voluntarily and intentionally with the purpose of avoiding a known legal duty.

Evidence of attempts to conceal the operation of a gambling business by one who participates in its operation and is liable for the taxes is a circumstance which can be considered on the issue of that person's willfulness.

That completes the instructions of law pertaining to the elements of the various counts of the indictment, ladies and gentlemen. In your deliberations, you should not give any consideration to the matter of possible punishment. That question is exclusively the responsibility of the Court.

Upon retiring to the jury room, you should select one of your number to serve as foreperson to preside over your deliberations. During the course of your deliberations, you should assume the attitude of judges of the facts rather than the attitude of partisans or advocates. Your highest contribution to the administration of justice will be to ascertain the facts in this case and return a verdict in accordance with those facts and these instructions of law.

(Tr 2191-2194)